89-2000

No. _____ (1)

Supreme Court, U.S.
FILED
JUN 22 1990
SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE L. WEBER, ESQ.
Counsel of Record
KENNETH L. GLICK, ESQ.
WEBER & ASSOCIATES, P.C.
727 Fifteenth St., N.W.
Tenth Floor
Washington, D.C. 20005
(202) 659-6400

Attorneys for Petitioner

RICHARD M. DIVALERIO, ESQ.
Secretary and General Counsel
National Fuel Gas Supply Corporation
10 Lafayette Square
Buffalo, New York 14203
(716) 857-7000

June 22, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the reviewing Court exceeded its authority when it set aside orders issued by the Federal Energy Regulatory Commission ("Commission") which allocate among customers the costs paid by an interstate pipeline to natural gas producers for gas under contract, but not taken, where Congress intended the Commission, in the first instance, to establish the method to determine just and reasonable rates?

(2) Whether the reviewing Court erred in concluding that the Commission's allocation of such costs among the pipeline's customers according to their prior gas purchase patterns (the "purchase deficiency" cost allocation method) violates the "filed rate doctrine"?

(3) Whether the reviewing Court erred in concluding that the Commission's allocation of such costs among the pipeline's customers according to the "purchase deficiency" method violates the prohibition against retroactive ratemaking?

PARTIES TO THE PROCEEDINGS BELOW

Parties in the court below and in the proceedings before the Federal Energy Regulatory Commission are listed at Appendix J in Petitioners' Joint Appendix filed concurrently herein.

The Respondent in the court below was the Federal Energy Regulatory Commission.

DESCRIPTION OF PETITIONER

Petitioner National Fuel Gas Supply Corporation ("Supply") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business located in Erie, Pennsylvania. It is a natural gas company whose jurisdictional activities are subject to regulation by the Commission under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*

All of the securities of Supply are held by National Fuel Gas Company, a holding company organized under the laws of the State of New Jersey and registered under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79a, *et seq.* In addition to the securities of Supply, National Fuel Gas Company also holds all of the securities of National Fuel Gas Distribution Corporation, Seneca Resources Corporation, Penn-York Energy Corporation, Empire Exploration, Inc., Utility Constructors, Inc., Highland Land and Minerals, Inc. and Data Track Account Services, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
DESCRIPTION OF PETITIONER	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
GROUNDS FOR THIS COURT'S JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED	7
A. The D.C. Circuit Failed To Follow Statutory Standards Of Review	7
1. Commission Rate Orders Are To Be Reviewed For Their End Results	7
2. Adoption Of An Appropriate Allocation Method Is A Question Of Fact Which, If Supported By Substantial Record Evidence, Is Binding Upon The Court	10
B. The D.C. Circuit Improperly Expanded The Filed Rate Doctrine To Limit The Commission's Ratemaking Authority	11
1. The Filed Rate Doctrine Is To Preserve The Commission's Primary Jurisdiction To Determine Just And Reasonable Rates	11
2. The D.C. Circuit's Interpretation Of The Filed Rate Doctrine Effectively Forecloses The Commission From Promulgating Cost-Based Rates	13

C. The Purchase Deficiency Method Does Not Violate The Rule Against Retroactive Ratemaking 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Court Cases:

Alabama Electric Co-Operative v. Federal Energy Regulatory Commission, 684 F.2d 20 (D.C. Cir. 1982) 5

Arkansas Louisiana Gas Company v. Federal Energy Regulatory Commission, 453 U.S. 571 (1981) ..... *passim*

Associated Gas Distributors, et al, v. Federal Energy Regulatory Commission, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990) ..... *passim*

City of Charlottesville v. Federal Energy Regulatory Commission, 661 F.2d 945 (D.C. Cir. 1981) ... 14

Colorado Interstate Gas Company v. Federal Power Commission, 324 U.S. 581 (1944) ..... *passim*

Columbia Gas Transmission Corporation v. Federal Energy Regulatory Commission, 831 F.2d 1135 (D.C. Cir. 1987) 5,12,15

Consolidated Gas Supply Corporation v. Federal Power Commission, 520 F.2d 1176 (D.C. Cir. 1975) 14

East Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 863 F.2d 932 (D.C. Cir. 1988) 14

Electrical District No. 1 v. Federal Energy Regulatory Commission, 774 F.2d 490 (D.C. Cir. 1985) 5,12

Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944) ..... *passim*

Federal Power Commission v. Natural Gas Pipeline Company, 315 U.S. 575 (1942) 12,17

Federal Power Commission v. Sunray DX Oil Company, 391 U.S. 9 (1968) 16

Table of Authorities Continued

	Page
Federal Power Commission v. Tennessee Gas Transmission Company, 371 U.S. 145 (1962)	16
Jersey Central Power & Light Company v. Federal Energy Regulatory Commission, 810 F.2d 1168 (D.C. Cir. 1985)	7
Montana-Dakota Utilities Company v. Northeastern P.S.C., 341 U.S. 246 (1951)	9,11,12,16
State Corporations Commission of Kansas v. Federal Power Commission, 206 F.2d 690 (8th Cir. 1953), *cert. denied*, 346 U.S. 922 (1954)	10
Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 871 F.2d 1099 (D.C. Cir. 1989)	4
Transwestern Pipeline Company v. Federal Energy Regulatory Commission, No. 88-1046, *denying reh'g* (D.C. Cir. issued May 31, 1990)	18
Administrative Cases:	
Atlantic Seaboard Corporation, 11 F.P.C. 43 (1952)	14
Tennessee Gas Pipeline Company, 42 FERC ¶ 61,175 (1988)	3
Tennessee Gas Pipeline Company, 43 FERC ¶ 61,329 (1988)	4
United Gas Pipe Line Company, 50 F.P.C. 1348 (1973)	14
Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 500, Interim Rules and Statement of Policy, Docket No. RM87-34-000, FERC Stats. & Regs. ¶ 30,761, 52 Fed. Reg. 30,334 (1987)	4
Statutes:	
Judiciary and Judicial Procedure, 28 U.S.C. § 1245(1)	2

Table of Authorities Continued

	Page
Natural Gas Act of 1938, As Amended, 15 U.S.C. §§ 717a, *et seq*	*passim*
Section 4, 15 U.S.C. § 717c	11,12,17
Section 4(a), 15 U.S.C. § 717c(a)	2
Section 4(d), 15 U.S.C. § 717c(d)	3
Section 5, 15 U.S.C. § 717d	15
Section 19, 15 U.S.C. § 717r	17
Section 19(b), 15 U.S.C. § 717r(b)	3,10
Regulations:	
18 C.F.R. § 54.63(e)(2)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. _____

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Fuel Gas Supply Corporation ("Supply") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") entered in this case.

OPINIONS BELOW

The decision of the D.C. Circuit is reported at 893 F.2d 349 (D.C. Cir. 1989) (Appendix A). The order of the D.C. Circuit denying suggestions for rehearing *en banc* is reported at 898 F.2d 809 (D.C. Cir. 1990) (Appendix B).

The thirteen orders reviewed by the D.C. Circuit were issued by the Federal Energy Regulatory Com-

mission ("Commission") in Docket Nos. RP86-119, *et al.*, Docket Nos. RP88-191, *et al.*, and Docket No. RP89-30-000 between February 8, 1988 and April 27, 1989. These orders are reported in Transfer Binders Nos. 42 through 47 of *Federal Energy Regulatory Commission*, Opinions, Orders, Decisions (CCH), and the citations thereto are listed at the Attachment included herewith.

GROUNDS FOR THIS COURT'S JURISDICTION

The decision of the D.C. Circuit was issued on December 28, 1989. Rehearing and suggestions for rehearing *en banc* were denied by the D.C. Circuit by order issued on March 30, 1990. On April 23, 1990, the D.C. Circuit issued an order granting a 60-day stay of its mandate.

The jurisdiction of this Court is invoked under Section 1245(1) of Title 28 of the United States Code and Section 19(b) of the Natural Gas Act of 1938, as amended ("NGA"), 15 U.S.C.§ 717r(b).

STATUTE INVOLVED

Section 4(a) of the NGA, 15 U.S.C. § 717c(a), reads:

> "(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

Section 4(d) of the NGA, 15 U.S.C. § 717c(d), reads in relevant part:

> "(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public."

Section 19(b) of the NGA, 15 U.S.C. § 717r(b), reads in relevant part:

> "* * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

STATEMENT OF THE CASE

This case raises a fundamental challenge to the Commission's ratemaking authority under the NGA and, if not reversed, will set aside ratemaking principles affirmed by this Court and followed by the Commission for over 45 years. The Commission's orders, subject to review, approved a contested offer of settlement proposed by Tennessee Gas Pipeline Company ("Tennessee") to pass through to its customers the costs it pays to producers for gas under contract to Tennessee, but not actually purchased by it ("take-or-pay" or "TOP" costs).

After originally approving Tennessee's offer of settlement, 42 FERC ¶ 61,175 (1988), on rehearing the

Commission amended the settlement to reflect its take-or-pay cost recovery policy adopted in Order No. 500, 52 Fed. Reg. 30,334 (1987), *pending sub nom. American Gas Association v. FERC*, No. 88-1588 (argument held May 8, 1990). *Tennessee Gas Pipeline Company*, 43 FERC ¶ 61,329 (1988). As finally approved by the Commission, Tennessee is authorized to recover up to $650 million of take-or-pay costs through a fixed monthly charge directly billed to Tennessee's sales customers. Tennessee agreed to absorb an equivalent amount in exchange for direct bill treatment.

This case focuses on the allocation of the directly-billed portion of Tennessee's TOP costs. The Commission required Tennessee to allocate the directly-billed TOP costs according to the difference between the level of a customer's gas purchases during a prior period—1981-1982 (the "base" period) and the customer's gas purchases during a subsequent period—1983-1986 (the "deficiency" period). A customer's deficiency in purchases yielded by this comparison, as compared to the total purchase deficiency of all of Tennessee's customers, determines an allocation percentage. The allocation percentages are applied against the total amount of TOP costs to be directly billed, to derive each customer's direct bill. This method of TOP cost allocation is called the "purchase deficiency" method.

As finally approved by the Commission, the allocation of Tennessee's directly-billed take-or-pay costs follows the cost incurrence principle. *See, Tennessee Gas Pipeline Company v. FERC*, 871 F.2d 1099, 1105 (D.C. Cir. 1989) (linking cost-incurrence with cost-causation, *i.e.*, collecting costs from those customers

that have caused the costs to be incurred); *see also, Alabama Electric Co-Operative v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (properly designed rates are to produce revenues from each class of customers which match, as closely as practicable, the costs to serve each class or individual customer).

Several of Tennessee's pipeline customers—Columbia Gas Transmission Corporation ("Columbia"), CNG Transmission Corporation ("CNG") and Equitable Gas Company ("Equitable")—reduced their gas purchases from Tennessee below their contractual obligation during the deficiency period in order to increase their purchases of gas from their own producer-suppliers and thus mitigate their own take-or-pay liabilities. In some instances, the gas was purchased at prices higher than for gas available from Tennessee.

These customers, which assume the largest share of funding responsibility under the purchase deficiency allocation method, petitioned for review of the Commission's orders. The petitioners asserted that the purchase deficiency method of cost allocation violates the "filed rate" doctrine. *See, Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 573, 577-78 (1981) ("*Arkla v. Hall*")

After review, the D.C. Circuit vacated and remanded the Commission orders, finding the purchase deficiency method violates the filed rate doctrine. *Associated Gas Distributors, et al. v. FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD I*"). The D.C. Circuit, relying on its decisions in *Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) ("*Electrical Dist.*") and *Columbia Gas Transmission Corporation v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987) ("*Columbia*") reasoned that the whole purpose of the filed

rate doctrine is to provide predictability to wholesale purchasers so that they can plan their activities to avoid incurring future costs. Thus, the D.C. Circuit's inquiry focused on the purchase decision to which the take-or-pay costs were attached (*e.g.*, the base and deficiency period purchases) to determine if the purchase decisions pre-dated the Commission's approval of Tennessee's direct bill. *AGD I*, 893 F.2d at 355. Since the purchase decisions pre-dated Tennessee's direct bill, the D.C. Circuit concluded that the purchase deficiency allocation method violates the filed rate doctrine. *AGD I*, 893 F.2d at 362. Significantly, however, Tennessee filed and received Commission approval of its direct monthly TOP charges before billing its customers. Thus, its customers *always* paid filed rates.

In the order denying suggestions for rehearing *en banc*, *Associated Gas Distributors v. FERC*, 898 F.2d 809 (D.C. Cir. 1990) ("*AGD II*"), Judge Williams wrote a concurring statement attempting, *inter alia*, to clarify his earlier *AGD I* opinion by distinguishing between the filed rate doctrine and the rule against retroactive ratemaking.

In *AGD II*, Chief Judge Wald, joined by Judges Mikva and Edwards, dissented. In the dissent, the Chief Judge noted that an allocation of take-or-pay costs by other than the purchase deficiency method would be inequitable since:

> "[t]hose consumers who are in a position to take advantage of open-access shipping will bear proportionately less of the loss than those who cannot—even though the former (by switching to other pipelines) are the ones responsible for the loss." 898 F.2d at 811.

Accordingly, the dissenting Judges would have granted rehearing *en banc* to avoid an "overly rigid interpretation of the filed rate doctrine." *Id.*

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

A. The D.C. Circuit Failed To Follow Statutory Standards Of Review

1. Commission Rate Orders Are To Be Reviewed For Their End Results

The D.C. Circuit failed to confine its review to the limits imposed by the NGA. In this regard, the D.C. Circuit's substantive role is to determine whether the Commission's orders contravene the statutory scheme prescribed by Congress in the NGA. In the context of rate orders, therefore, the D.C. Circuit is to examine the end result of the Commission's orders and if the end result is just and reasonable, judicial inquiry under the NGA is at an end and the Commission's orders stand. *See, FPC v. Hope Natural Gas Company*, 320 U.S. 591 (1944) ("*Hope*"). Indeed, in its prior decisions the D.C. Circuit expressly re-affirmed the *Hope* end-results standard applies to review of the Commission's rate orders. *See, Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987).

Here, the D.C. Circuit never reached the central issue and thus never found the purchase deficiency method to yield an unjust and unreasonable end result. In fact, the dissenting opinion in *AGD II*, strongly suggests that the purchase deficiency method may be the only allocation method meeting the just and reasonable standard. The D.C. Circuit's conclusion that the purchase deficiency method of cost al-

location violated the filed rate doctrine, therefore, is peripheral, at best, to the central issue—did the end result of the order satisfy Congress's intent that rates be just and reasonable.

In sharp contrast to the D.C. Circuit's decision below, this Court has clearly spelled out that if the end result is just and reasonable, the fact that the method employed to reach that result may contain infirmities is not important. *Hope*, 320 U.S. at 602. Here, the D.C. Circuit ignored this Court's instructions and thus truncated its analysis after finding a perceived infirmity in the allocation method, without determining the core issue of whether the end result of the allocation method is just and reasonable.

Moreover, the D.C. Circuit's review falls well short of the analysis clearly prescribed by this Court in *Colorado Interstate Gas Company v. FPC*, 324 U.S. 581 (1944) ("*CIG*"). There, this Court was confronted with a challenge to the cost allocation method of the Commission's predecessor, the Federal Power Commission ("FPC"). In upholding the FPC's use of historic annual and peak day throughput amounts to allocate costs for future rates, this Court stated:

> "Rate-making is essentially a legislative function [citation omitted]. Congress to be sure has provided for judicial review of the Commission's orders [citations omitted]. *But that review is limited to keeping the Commission within the bounds which Congress has created.* When Congress, as here, fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it

> plainly contravenes the statutory scheme of regulation." (emphasis added) 324 U.S. at 589.

Significantly, the cost allocation in *CIG* relied on past purchase decisions—the historic peak day and annual throughput in the test period—to allocate costs in the design of rates for future effect.

CIG is a refrain from this Court's conclusion in *Hope* that "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. . . It is not theory but the impact of the rate order which counts." 320 U.S. at 602.

This Court described the statutory standard of "just and reasonable" in *Montana-Dakota Utilities Company v. Northeastern P.S.C.*, 341 U.S. 246 (1951) ("*Montana-Dakota*"). There, this Court described that:

> "* * * [s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. . . A court may think a different level more reasonable. *But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.*" (emphasis added) 341 U.S. 251.

It is clear, therefore, that the D.C. Circuit failed to follow the statutory "just and reasonable" standard

and improperly foreclosed the Commission from exercising its right, conferred by Congress under the NGA, to prescribe the allocation method yielding a just and reasonable end result.

2. Adoption Of An Appropriate Allocation Method Is A Question Of Fact Which, If Supported By Substantial Record Evidence, Is Binding Upon The Court

The appropriateness of the method employed by the Commission to allocate costs in a given case raises questions of fact, not of law. *CIG*, 324 U.S. at 589; *State Corporations Commission of Kansas v. FPC*, 206 F.2d 690, 708 (8th Cir. 1953). Further, under Section 19(b) of the NGA, the Commission's findings of fact are conclusive upon a reviewing court, unless lacking evidentiary support. Thus, the D.C. Circuit was bound to accept the Commission's allocation method, unless the evidentiary record demonstrates otherwise.

In this case, the allocation of Tennessee's take-or-pay costs according to the purchase deficiency method was fully considered by the Commission and based on the record. The purchase deficiency method was an issue specifically considered in testimony before an administrative law judge in the proceeding below. Extensive comments were filed on the various cost allocation methods contained in the six competing settlements filed in the proceeding. In addition, Tennessee made numerous filings demonstrating the impact of the purchase deficiency method on each of its sales customers.

Thus, the Commission had an abundance of record evidence enabling it to reach its decision to adopt the purchase deficiency allocation method. Moreover, the

record evidence amply supports the Commission's conclusion that the purchase deficiency method is the allocation method which best reflects the cost-causation, cost-incurrence principle.[1]

The D.C. Circuit overstepped its authority, therefore, in reviewing the merits of the Commission's allocation method without first weighing and finding whether the record evidence relied upon by the Commission was deficient.

B. The D.C. Circuit Improperly Expanded The Filed Rate Doctrine To Limit The Commission's Ratemaking Authority

1. The Filed Rate Doctrine Is To Preserve The Commission's Primary Jurisdiction To Determine Just And Reasonable Rates

Here, the D.C. Circuit unjustifiably expanded the filed rate doctrine beyond the limits and purpose described in *Arkla v. Hall*, and indeed beyond the Congressional purpose underlying Section 4 of the NGA—that the Commission enjoy primary jurisdiction to determine the justness and reasonableness of rates. Indeed, the filed rate doctrine is only a judicially created doctrine which, as Justices Stevens and Rehnquist explained in *Arkla v. Hall*, until the date of that decision, had never been used by this Court.

This Court explained in *Arkla v. Hall* that the filed rate doctrine follows from its holding in *Montana-Dakota* that a regulated pipeline has a right to collect

---

[1] Although sufficient evidence exists in the record to support the purchase deficiency method as the proper method, the record also demonstrates that further adjustments need to be made to the base period purchases to produce a representative base period.

only the rate which is filed with or fixed by the Commission. Thus, this Court explained, the considerations underlying the filed rate doctrine are (1) preservation of the Commission's primary jurisdiction to determine in the first instance what constitutes a just and reasonable rate and (2) the Commission's need to insure that regulated pipelines charge only those rates of which the Commission first has been made cognizant. *Arkla v. Hall*, 453 U.S. 577-78.

In short, the filed rate doctrine is a procedural doctrine narrowly designed to enable the Commission to discharge its regulatory responsibilities under Section 4 of the NGA.

Here, the D.C. Circuit expanded the filed rate doctrine to embrace an entirely new function. The D.C. Circuit held that the entire purpose of the filed rate doctrine is to provide customers with rate predictability so that they may fashion their activities with prior knowledge of the rate consequences. *See, AGD I*, 893 F.2d at 356, quoting *Columbia*, 831 F.2d at 1141; *see also, Electrical Dist.*, 774 F.2d at 493.

But, the D.C. Circuit's conclusion (which has yet to be adopted in any other Circuit) conflicts with *Arkla v. Hall* and *Montana-Dakota*, which instruct that the filed rate doctrine is to protect the *Commission's* primary jurisdiction under Section 4 of the NGA, and not confer "predictability" for the customers.

Moreover, the NGA contains no statement of Congressional intent to support the D.C. Circuit's interpretation of the filed rate doctrine. Indeed, in *FPC v. Natural Gas Pipeline Company*, 315 U.S. 575 (1942) and *Hope*, this Court recognized that Congress left it to the Commission (not the judiciary) to de-

termine what methods will produce just and reasonable rates.

Accordingly, the D.C. Circuit's construction of the filed rate doctrine is contrary to this Court's instructions, has no statutory support, and usurps the Commission's primary jurisdiction to establish the prescription for just and reasonable rates.

2. The D.C. Circuit's Interpretation Of The Filed Rate Doctrine Effectively Forecloses The Commission From Promulgating Cost-Based Rates

The D.C. Circuit decided that the filed rate doctrine precludes rates designed according to a cost allocation method which does not provide customers with rate predictability at the time they decide to purchase gas from a pipeline, even though the customers contracted for the right to purchase that gas years earlier. Under the Commission's traditional cost-based ratemaking, however, rates for prospective application are *always* designed according to a cost allocation which reflects historic customer activity (*e.g.* "test period" data). *See*, 18 C.F.R. § 154.63(e)(2) of the Commission's Regulations.

Under the Commission's cost-based ratemaking, pipeline rates are predicated on costs and volumes during a 12-month "test period" preceding filing of the rate change. Customers have no specific knowledge, at the time they are receiving service, of the dollars and cents result, in terms of future rates, of their actions during the "test period". Consequently, under the D.C. Circuit's novel interpretation of the filed rate doctrine, rates based on a historic test period would lack the necessary element of "predictability" and run afoul of the newly-expanded filed rate doctrine.

Cost-based ratemaking using historic test period data has long been supported in judicial decisions. *See, CIG*, where this Court upheld the Commission's allocation of capacity (demand) costs on the basis of historic peak day purchases and the Commission's allocation of volumetric (variable) costs on the basis of gas delivered to individual customers during the test year; *see also, City of Charlottesville v. FERC*, 661 F.2d 945, 952 (D.C. Cir. 1981) ("In both the natural gas and electric industries, the Commission traditionally utilizes past period data to set future rates."). In fact, all of the Commission's methods of designing pipeline rates allocate costs, in varying proportions, according to system usage during a historic test period.[2]

The D.C. Circuit's decision which would negate the use of historic data in allocating costs is thus contrary to what this and other courts have recognized as lawful ratemaking for the past 45 years.

Indeed, if historic data cannot be used in ratemaking, the Commission will have no method available to set rates so that those parties receiving a service pay the pipeline's cost of providing that service. *CIG*, 324 U.S. at 590. It is hard to imagine any scenario in which the Commission would be able to determine cost-based rates if it was unable to use actual costs previously incurred as the basis of future rates

---

[2] *See e.g., Atlantic Seaboard Corporation*, 11 F.P.C. 43 (1952), approved *sub nom. State Corporation Commission of Kansas v. FPC*, 206 F.2d 206 (8th Cir. 1953), *cert. denied* 346 U.S. 922 (1954); *United Gas Pipe Line Company*, 50 F.P.C. 1348 (1973), *aff'd sub nom. Consolidated Gas Supply Corporation v. FPC*, 520 F.2d 1176 (D.C. Cir. 1975); *East Tennessee Gas Pipeline Company v. FERC*, 863 F.2d 932 (D.C. Cir. 1988).

charged for a service. Even if rates could be established on another basis, it is for the Commission, not the courts, to undertake that exercise in the first instance. Thus, the D.C. Circuit's decision raises an important federal question concerning the proper interpretation of the filed rate doctrine, as it applies to an agency's ability to regulate rates.

C. The Purchase Deficiency Method Does Not Violate The Rule Against Retroactive Ratemaking

Although the D.C. Circuit styled its decision as an application of the filed rate doctrine, the theory (predictability) underlying its analysis is more akin to the theory underlying the rule against "retroactive ratemaking". Indeed, the D.C. Circuit placed great weight in its decision on *Columbia*, which involved an application of the prohibition against "retroactive ratemaking". In acknowledgement of the confusion in *AGD I* between the rule against retroactive ratemaking and the filed rate doctrine (which have been used interchangeably on previous occasions by the D.C. Circuit), Judge Williams attempted on rehearing in *AGD II* to clarify the distinction between the two principles. His continuing confusion of the two principles is evident from his statement. Judge Williams opines that "* * * [i]f current gas costs surged, for example, and the Commission responded by authorizing a surcharge on individual customers' 1984 takes, the violation of the *filed rate doctrine* would be plain." (emphasis added) 898 F.2d at 810. To the contrary, this Court has long held that a surcharge in current rates for past gas purchases is a violation of the *rule against retroactive ratemaking*.

The rule against retroactive ratemaking derives from Section 5 of the Natural Gas Act, 15 U.S.C.

§ 717d, which limits Commission-ordered relief from unjust and unreasonable rates to prospective application. This Court succinctly characterized the bar to retroactive ratemaking as originating in the Commission's lack of authority to award reparations. *See, Hope*, 320 U.S. at 618; *see also, Montana-Dakota*, 341 U.S. at 254; *further FPC v. Sunray DX Oil Company*, 391 U.S. 9, 24 (1968). Thus, if the Commission finds a pipeline's rate to be too low, the pipeline can not recoup its losses by making retroactive the higher rate subsequently allowed. *See, FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 153 (1962).

In any event, the rule against retroactive ratemaking is no bar to the Commission's adoption of the purchase deficiency cost allocation method. The TOP costs recovered through the direct bill were not paid by Tennessee during the base or purchase deficiency periods. Instead, the TOP costs were paid by Tennessee contemporaneous with or after it received Commission approval to institute the direct billing mechanism. Thus, the purchase deficiency method is not being used to recoup past costs, *but only to derive allocation percentages* for individual customers, which are then applied against current costs which Tennessee actually paid, or will pay within the near future, to its producer-suppliers.

While arguably "predictablity" may be an incidental by-product of the rule against retroactive ratemaking (customers can accurately predict rates for the services they contract by referring to the Commission-filed rate, knowing that they will not be surcharged additional amounts for services previously rendered), "predictability" is not a statutory purpose expressed in the NGA. "Predictability" in the cost allocation

process is not compelled by the NGA and thus its absence[3] is not enough to nullify rates whose end result the Commission has found to be just and reasonable. Accordingly, the D.C. Circuit's reliance on a "predictability" standard to set aside just and reasonable rates—without an analysis of the end result—is a case of the "tail wagging the dog" and should be vacated by this Court.

CONCLUSION

The review employed by the D.C. Circuit did not comport with statutory standards under Sections 4 and 19 of the Natural Gas Act. The D.C. Circuit erred by not analyzing the end-results of the Commission's action, as required by *Hope*. Further, the Court erred by substituting its own findings of fact as to the appropriateness of the allocation method for those of the Commission, even though the Commission's adoption of the purchase deficiency allocation method was rooted on substantial record evidence.

As a result of the D.C. Circuit's improper judicial activism, the Commission's ability to follow cost-based ratemaking, which this Court recognized in *FPC v. Natural Gas Pipeline Company*, 315 U.S. 575 (1942) as comporting with Constitutional requirements, is threatened. Likewise, the cost-causation, cost-incurrence principle is threatened since the allocation of costs, through rates, to parties actually responsible for incurrence of the costs is only possible through use of historic data.

---

[3] The record below reflects the fact that Columbia, CNG and Equitable had *actual* knowledge at the time of their gas purchase decisions that their cutback of purchases from Tennessee would expose them to liability for a portion of Tennessee's TOP costs.

In addition, to accomplish its objective the D.C. Circuit improperly expanded the filed rate doctrine in a manner inconsistent with this Court's seminal decision in *Arkla v. Hall.* Moreover, the D.C. Circuit's expansion of the filed rate doctrine is an unsupportable departure from this Court's and the Commission's accepted and usual definition of the filed rate doctrine. Thus, this Court must exercise its power of supervision over the D.C. Circuit.

In these circumstances, the D.C. Circuit departed from the precedents of this Court, the other Circuit Courts of Appeal and its own precedents. Significantly, Chief Judge Wald recognized that the D.C. Circuit has strayed from these precedents in its recent applications of the filed rate doctrine and in essence requested the intervention of this Court to restore the filed rate doctrine to its proper significance.

> "* * * I think the court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry. However, the decisive vote against rehearing *en banc* in *AGD v. FERC* convinces me that to call for a vote for rehearing *en banc* in this case would be equally futile. It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts at allocating the inequitable burdens stemming from fundamental readjustment of the pipeline industry." *Transwestern Pipeline Company v. FERC,* No 88-1046, *denying reh'g en*

banc (D.C. Cir. issued May 31, 1990) (*slip op*, at 2).

For the reasons set forth above, Supply prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Supply prays that upon review of the record in the D.C. Circuit, its judgment be reversed and that it be ordered to issue a further decision on the "implementation issues" which were briefed, argued, and never decided on the merits by the D.C. Circuit.

Respectfully submitted,

GEORGE L. WEBER, ESQ.
Counsel of Record
KENNETH L. GLICK
WEBER & ASSOCIATES, P.C.
727 Fifteenth Street, N.W.
Tenth Floor
Washington, D.C. 20005
(202) 659-6400

Attorneys for Petitioner

RICHARD M. DIVALERIO
Secretary and General Counsel
National Fuel Gas Supply Corporation
10 Lafayette Square
Buffalo, New York 14203
(716) 857-7000

June 22, 1990

ATTACHMENT

ATTACHMENT
Citations To Orders Under Review

(1) *Tennessee Gas Pipeline Co.*, 42 FERC ¶ 61,175 (1988)

(2) *Tennessee Gas Pipeline Co.*, 43 FERC ¶ 61,329 (1988)

(3) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,039 (1988)

(4) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,155 (1988)

(5) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,330 (1988)

(6) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,401 (1988)

(7) *Tennessee Gas Pipeline Co.*, 45 FERC ¶ 61,008 (1988)

(8) *Tennessee Gas Pipeline Co.*, 45 FERC ¶ 61,431 (1988)

(9) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,021 (1989)

(10) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,156 (1989)

(11) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,264 (1989)

(12) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,344 (1989)

(13) *Tennessee Gas Pipeline Co.*, 47 FERC ¶ 61,110 (1989)